Fishburne, A. J.: The indictment in this case is based upon Section 1112, 1942 Code, the pertinent portion of which reads as follows: 685

> "Any person * * * who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, 686 shall be punished by imprisonment in the penitentiary for a term of not more than twenty years nor less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman."

The abortion was performed upon Inez Crawford, a young woman eighteen years of age, on June 23, 1942, by Henrietta Henderson, a former negro midwife, at her home some miles out of the city of Spartanburg. This criminal operation was followed by miscarriage and death, on June 26th, and the defendant was indicted for his alleged part in the crime. 687

From a judgment of conviction the defendant appeals to this Court, raising two issues, the first of which imputes error to the lower Court in admitting over objection the testimony of Sheriff S. M. Henry, in which he undertook to testify to certain statements made by Henrietta Henderson in the presence of the defendant, William E. Evans, while both of them were under arrest in the county jail.

Sheriff Henry and two other officers arranged an interview in which Evans was confronted by Henrietta 688

Henderson, who made accusatory statements to Evans,
689 or in his presence, tending to incriminate him in the procurement of the criminal abortion. This testimony is not over long, and we quote it:

"Q. Whom did you bring into the room, into Mr. Evans' presence? A. Brought Henrietta Henderson.

"Q. What did she state to Mr. Evans, and in his presence? A. She stated that Mr. Evans had come over there to her house, after the car had left her house and the girl; and after she arrived home the girl was at her house a couple of hours,
690 something like that, Mr. Evans come back to her house and stayed for some time; and she carried her out and done the job what she stated. She said that she used something, some instrument on this girl * * *.

"Q. What did she say she used it for? A. For to cause a miscarriage.

"Q. Where did she say that took place? A. In her house in the back room, in the presence of Mr. Evans.

691 "Q. Where did she tell Mr. Evans he was sitting? A. In the room just opposite, on the couch or lounge; said her husband was there with him.

"Q. What happened, when they came out of the room? A. The girl had Ten Dollars folded up in her hand, and give it to Henrietta, and told her Mr. Evans give her the Ten Dollars to give Henrietta * * *.

"Q. Wait a minute: What did she say about—did Mr. Evans say anything about he was respon-
692 sible for it?

"The Court: Don't lead the witness.

"Q. Do you remember what she said and what Mr. Evans said? A. She said Mr. Evans told her that he was the cause of the woman being in that fix. 693

"Mr. Brown: We are reserving our exceptions * * *.

"Mr. Watt:

"Q. How did she say she left there? How did she say they left there? A. Said he promised her another Five Dollars; and he left there with her in the automobile.

"Q. When she finished telling it, what did Mr. Evans say to Henrietta? A. Well, he denied it. 694

"Q. What else did he say? When Henrietta told him: 'Mr. Evans, you came by my house after the girl had died, and tried to get me to leave,' what did he say? A. He said he did not do it.

Cross Examination

"Mr. Brown: Now, subject to our objection and exceptions, we will ask these questions:

"Q. Now, Sheriff, Mr. Evans denied his guilt before and after he saw Henrietta, did he not? A. Yes, sir; he denied it." 695

There are two questions relative to the reception of this testimony: Was the evidence competent under the rules governing the introduction of confessions and admissions? And, Was its admission prejudicial to the defendant as violating the hearsay rule? If, by the admission of testimony which should not have been received, it is probable that the minds of the jury were influenced to a greater degree against the defendant than if no such testimony had been received, then the 696

error would be deemed prejudicial to the defendant. *Entzminger v. Seigler*, 186 S. C., 194, 195 S. E., 244.

697 The appellant contends that the foregoing testimony was inadmissible under the rule announced in *State v. Hester*, 137 S. C., 145, 134 S. E., 885, to the general effect that testimony as to the failure of a defendant to deny or refute a charge of guilty, made when he is under arrest and in the presence of officers, is inadmissible in evidence in his subsequent trial; that under such circumstances he may stand mute, and his silence will not be taken as a tacit admission of guilt. The *Hester case* is not applicable here, because the de-
698 fendant did not maintain silence.

The evidence, however, is objectionable and inadmissible upon another ground. The defendant not only did not stand mute, but made a complete and positive denial of the incriminating statements made by Henrietta Henderson, and under these circumstances the testimony should have been excluded.

Statements accusing or incriminating accused made in his presence, but unequivocally denied by him *in toto*, are not admissible against him. They do not show
699 an admission, and are not admissible merely because made in his presence. The defendant's denial of the third person's statement destroys entirely the ground for using it. *State v. McIntosh*, 94 S. C., 439, 78 S. E., 327, 22 C. J. S., Section 734, page 1265; *Pinn v. Commonwealth*, 166 Va., 727, 186 S. E., 169; Wigmore on Evidence (3rd Ed.), Volume 4, Section 1072, page 74 *et seq.*

The testimony of Sheriff Henry also violated the rule against hearsay, and on this ground was inad-
700 missible. But did the reception of this evidence constitute prejudicial error? The defendant upon his trial

was confronted by the witness Henrietta Henderson, and fully exercised his privilege of cross-examining her, and her testimony went much further than the statement she made to the sheriff in circumstantial detail. While the testimony of Sheriff Henry should not have been received, this, in our opinion, did not result in prejudicial error nor affect the result of the verdict, as we shall attempt to show. 701

It is plain, we think, that the State did not rely for conviction upon the testimony of Sheriff Henry, who was the ninth and last witness offered by the prosecution. Henrietta Henderson, also indicted, had pleaded guilty, and was offered by the State as its first witness. 702 Her testimony showed, step by step, the direct connection of the defendant, Evans, with the crime charged against him. From this testimony, and from that of many other witnesses, the jury was amply justified in believing that the defendant initiated and planned the procurement of the abortion, and was present in the negro woman's house, in an adjoining room, while it was being performed. She testified that the defendant brought the girl to her home and solicited her to perform the criminal operation, and admitted that he was responsible for her condition. 703 It is admitted that Inez Crawford had been employed by the defendant in his undertaking establishment as a receptionist about four months before her death, and that she had her living quarters there. It is further shown that within a few hours after Henrietta Henderson had been arrested and imprisoned, the defendant secured bondsmen for her release at a cost to him of $30.00, and that he immediately thereafter interviewed her in the effort to suppress her evidence against him. 704 That before her arrest he went out to her home in the

country and attempted to get her to flee, which she refused to do.

705 No contention is made that there was not sufficient evidence to warrant the submission of the case to the jury, so that we will not attempt a resumé of all of the evidence. But it should be stated that the testimony of Henrietta Henderson is corroborated not only by her husband who said he was present in the house with the defendant when the operation was performed, but by numerous other witnesses. Incriminating circumstances testified to by witness after witness, some of whom were his employees, all indisputably point to
706 the defendant's guilt. Every element of the crime is proved by overwhelming evidence, independently of the statement testified to by the sheriff, and the error of the Court in admitting his statement may safely be disregarded as harmless.

After a thorough examination of the whole record, we are convinced that the testimony did not affect the result of the trial, and its admission did not invade a substantial right of the defendant. In the light of the testimony in this case, we do not believe that an in-
707 telligent and honest jury could be impaneled who, with a due regard for their oaths and the testimony, could legitimately come to any conclusion other than that the appellant was guilty.

Where guilt is conclusively proved by competent evidence, and no other rational conclusion could be reached but that the defendant is guilty, a judgment of conviction should not be set aside because of unsubstantial errors not affecting the result. *State v. Ford,* 3 Strob., 517, 526 (34 S. C. L.); Wigmore on Evidence (3rd Ed.), Volume 1, Section 21.

708 The rule approved by this Court was clearly stated by Judge O'Neall in *State v. Ford, supra,* as follows:

"According however, to a well settled rule in criminal cases, if the prisoner's guilt were clearly made out by proper evidence, in such a way as to leave no doubt in the mind of a reasonable man, his 'conviction ought not to be set aside because some other evidence was received which ought not to have been.' The rule is, I know, to be tenderly and cautiously applied; and I would be the last man on earth to apply it where there was room to doubt. But when I know that the prisoner's guilt is as plainly made out by the other evidence, as it is possible to be done, I should feel that I was literally straining at a gnat, while, in fact, I was swallowing a camel, if I hesitated in applying it to this cause."

The second question presents for review the action of the presiding Judge in continuing the session of the Court after the hour previously announced for adjournment had been reached. It is contended that in so doing he forced the defendant to take the stand prior to the time planned by his counsel, and that the Court took over the direction of the defense; that counsel was taken by surprise, and had no opportunity to consult with their client with reference to the testimony which had been given against him earlier in the day.

The trial of this case was commenced on July 27, 1942, and ended the next day. At the time referred to, on the first day of the trial, the State had introduced nine witnesses, and the defense eight. It is not entirely clear from the record, but it may be inferred that announcement had been made that the sessions of the Court would run from 9:30 A. M., to 1:00 or 1:30 P. M., and from 3 P. M., to 6 P. M. After the conclusion of the

testimony given by the eighth witness for the defense,
713 this occurred:

"Mr. Brown: We wish now to ask that your Honor suspend until tomorrow morning; we have a witness that will be here. We'll have them here. Your Honor announced the hours of Court would be 9:30 to 1:00 or 1:30, and 3:00 to 6:00, and we made our arrangements to work accordingly * * *.

"The Court: Is there nothing else you can do, gentlemen, between now and seven o'clock? Let the jury go in the room there. (Jury retires.) I
714 am not going to lose this hour if I can help it; if you have anybody else, we will go on. How about the defendant—are you going to put him up?

"Mr. Brown: After the witness we will have here is what we had in mind. We have eliminated a lot * * *.

"The Court: Put the defendant up—you've got an hour for that. Bring the jury back. (Jury returns.) Proceed, gentlemen."

The granting or the refusal of an adjournment or
715 suspension of a trial of a criminal case rests in the sound discretion of the trial Court, and the Court in the exercise of its discretion, if the rights of the accused are not thereby prejudiced, may determine that the session shall open at an hour other than the customary opening hour, or that the session shall continue after the customary hour of adjournment. 23 C. J. S., Section 985, page 329.

The question for decision here is whether the rights of the accused were prejudiced, as claimed, by extending the session beyond 6 o'clock P. M. The record shows
716 that counsel made no statement to the Court that he desired time or opportunity to consult with his client,

the accused, prior to offering him as a witness; nor does it appear that surprise, if present, worked to his disadvantage. Nor does the examination of the defendant by his counsel reveal that any additional time was needed. In fact, while the direct examination of the defendant was proceeding, it was interrupted by the adjournment of Court for the day, and this examination was resumed by defendant's counsel the next morning, so that even if additional time had been needed for consultation it was offered during that period of adjournment. 717

We do not think that there is any merit in the suggestion that the Court assumed direction of the defense and forced the defendant to become a witness. In reply to the Court's inquiry: "Are you going to put him (the defendant) up?" counsel stated, in effect, that the defendant would be offered as a witness after another witness for the defense had been examined. It appeared simply to be a question of putting the defendant on the stand before or after the witness who was expected to arrive. The action of the Court exhibited nothing more than a desire to facilitate the progress of the trial, and, in our opinion, was not indicative of any intention to force the defendant to take the stand in violation of his constitutional right not to testify if he chose not to do so. 718 719

Appellant excepts because the Circuit Judge ordered all of the testimony taken in the trial below incorporated in the record for appeal to this Court. It is contended that only the selections we have quoted in this opinion should have been printed. There was no error. In passing upon the appeal this Court found it necessary to examine the entire record. 720

In our opinion, the defendant has had a fair and im-
721 partial trial, and we see no merit in the exceptions.

Judgment affirmed.

Mr. Chief Justice Bonham, Messrs. Justices Baker and Stukes, and Circuit Judge William H. Grimball, Acting Associate Justice, concur.

PETITION FOR REHEARING

The defendant, W. E. Evans, petitioning the Court, would respectfully show:

1. That he is the Defendant in the above-entitled ac-
722 tion and has been acquainted by his Attorneys with the decision of this Court filed under date of March 29, 1943.

2. That your Petitioner verily believes that the Court misapprehended the full significance of this Defendant's Argument in connection with the alleged error of the Trial Judge in connection with the two exceptions taken by the Defendant and argued by his Attorneys before this Court in the following particulars, to wit:

723 (a) This Court held in its decision in ruling upon Question Number One on appeal that:

> "The evidence, however, is objectionable and inadmissible upon another ground. The Defendant not only did not stand mute, but made a complete and positive denial of the incriminating statements made by Henrietta Henderson, and under these circumstances the testimony should be excluded.
>
> "Statements accusing or incriminating accused made in his presence, but inequivocably denied by him *in toto,* are not admissible against him. They
724 do not show an admission merely because made in his presence—

"The testimony of Sheriff Henry also violated the rule against hearsay and on this ground was inadmissible. But did the reception of this evidence constitute prejudicial error—? 725

"After a thorough examination of the whole record, we are convinced that the testimony did not effect the results of the trial, and its admission did not invade a substantial right of the Defendant."

The Court by this ruling held that all of the material evidence offered by Sheriff Henry was inadmissible and objectionable. In doing this the Court overlooked the fact that the able Solicitor of the Seventh Judicial 726 Circuit argued its admissibility and had it admitted over the objection of the Attorneys for this Defendant. Had it not been material and had the Solicitor not considered it material, why should he have insisted upon its admission and taken the time of the Court to put Sheriff Henry upon the stand? If it was not considered material would Sheriff Henry, the Chief Law Enforcement Officer, have offered himself as a witness?

Up until Sheriff Henry was placed on the witness 727 stand, the only direct evidence as to the crime was from a self-confessed perpetrator of this crime and her husband, who was anxious to aid his wife. Can the Court, which did not see the witnesses, nor feel the atmosphere of the Court room, take upon itself the responsibility of passing upon facts and their influence upon a Jury without seeing this witness in and by our constitutional provisions that the influence of facts are exclusively for the jury? The prosecution officer thought it was material or else he would not have insisted upon its admission; the sheriff, whose duty it 728 is to develop the evidence for the Solicitor, thought it

material or else he would not have presented himself
729 for a witness. Now, can this Court without seeing the witnesses, or hearing them testify, determine that this evidence did not influence the Jury when the able Solicitor and the chief law enforcement officer, and the able Dean of the Circuit Bench, believed this testimony material and would influence the Jury?

In view of this decision, how can a lawyer defending one accused of crime determine the admissibility of evidence? How can he judge whether it is material or not when the ablest solicitor, the chief law enforcement officer and the revered Judge rule it is material?
730 How can we determine the line of demarcation between law and facts?

By way of illustration, in Civil suit, regardless of the amount or force of evidence offered by a plaintiff, if he mentions the fact that the Defendant has insurance, the Court will, without question, grant a mistrial upon motion made by the Defendant. In that situation it is not a question of whether the greater weight of evidence is in favor of the Defendant or the Plaintiff. The only question is, Did the plaintiff men-
731 tion insurance? The Court takes judicial notice of the fact that the mentioning of insurance carried by the Defendant will probably influence the amount of the verdict. Now, in a criminal case the mere fact that the High Sheriff, who stands well with the people in Spartanburg County, testifies as to certain facts, we think the Court should take judicial notice of its probable influence. The fact that corroborated certain statements of a co-defendant would certainly lend weight. Is the mere fact that there was ample evidence upon which
732 to base a verdict to be the deciding factor in a case, or is the deciding factor to be, did this immaterial and

inadmissible evidence have any effect upon the decision of the Jury?

733 Your petitioner respectfully submits that where one is accused of a crime, the conviction of which, carries with it the odium conviction in this case carries, any evidence which might influence a Jury should be excluded, and only the Jury should pass upon its materiality.

(b) "The question for decision is whether the rights of the accused were prejudiced as claimed, by extending the session beyond six o'clock P. M.", says the Court.

734 We most respectfully submit that the Court overlooked the fact and law of the principal element of the question involved under the Second Exception, to wit: The right of the presiding Judge, not alone to extend the session, but himself, after having asked, "How about the Defendant? Are you going to put him up?", interrupt counsel, who said, "After the witness we will have here is what we had in mind. We have eliminated a lot—", and without allowing counsel to finish, to order counsel: "Put the Defendant up. *You've got an hour for that. Bring the Jury back.* Proceed."

735 Did the Defendant and his counsel have that absolute freedom guaranteed him by the authorities cited in our brief? Did not the Judge single out the defendant, even ask, "How about the Defendant?" Are you going to put him up?", and say, "Put the Defendant up. You've got an hour for that."

Our opinion is that the mere extension of the Court for an hour is discretionary; but his Honor himself singled out the Defendant and ordered him to the stand for that hour. The defendant's counsel never had the 736 opportunity to finish his statement to the Court. The

Defendant was ordered to the stand before his other
787 witnesses were heard next day and before he could consult his attorneys or his own mind as to what to do, go to the stand then, or refuse to testify, although he is not to be a witness against himself, and the solicitor cannot even comment on a Defendant's failure to take the stand. The Court did not simply say, proceed, leaving counsel and Defendant to decide in what way and what order; but ordered Defendant to the stand. Is this due process?

Respectfully submitted,

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D. W. Galloway,
John F. Williams,
C. Yates Brown,
Attorneys for the Defendant-Appellant.

STATE OF SOUTH CAROLINA
County of Spartanburg

789 Personally appeared before me W. E. Evans, who being duly sworn, says that he has read the foregoing petition, and knows of his own knowledge that the allegations made therein are true, except as to those made upon information and belief, and as to those he believes it to be true.

W. E. Evans.

Sworn to and subscribed before me this the 7th day of April, 1943.

740 C. Yates Brown (SEAL)
Notary Public for S. C.

CERTIFICATE

I, a member of the South Carolina bar, certify that 741
I have examined the record in the above-entitled case, and also the Petition for a re-hearing and in my opinion there is merit in the grounds set out in the said petition.

SAM N. BURTS.

After due consideration of the within petition, the Court is satisfied that it presents no meritorious ground for a rehearing.

Petition is therefore denied. 742

M. L. BONHAM,
Chief Justice,
D. GORDON BAKER,
E. L. FISHBURNE,
T. H. STUKES,
Associate Justices,
WM. H. GRIMBALL,
Acting Associate Justice.

May 11, 1943.

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NOTICE OF MOTION FOR BAIL

To Hon. John M. Daniel, Attorney-General of South Carolina, and the Hon. Samuel R. Watt, Solicitor Seventh Circuit:

Please Take Notice, That at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the undersigned will move before the Supreme Court of South Carolina, on June 14, 1943, for an order granting bail to the defendant-appellant, William E. Evans, said motion to be made upon the records in said court, and 744
affidavit annexed hereto, said bail to be granted pend-

ing a review by the Supreme Court of the United
745 States of the issues adjudicated by this Court.

WILLIAMS & BUSBEE,
By JOHN F. WILLIAMS,
C. YATES BROWN,
Attorneys for Defendant-Appellant.

May 31, 1943.

Service accepted without prejudice to the rights of the State.

SAM R. WATT,
Solicitor Seventh Circuit.

746 June 1, 1943.

AFFIDAVIT

STATE OF SOUTH CAROLINA }
COUNTY OF AIKEN }

PERSONALLY appeared before me JOHN F. WILLIAMS, who, being duly sworn, say that the defendant, William E. Evans, has engaged his firm to seek a review by the Supreme Court of the United States
747 of the issues decided by this Court herein; and that during the present week he intends to make the preliminary arrangements looking to that end. Deponent further says that the defendant is in the State Penitentiary awaiting the outcome of such effort to bring the issues before the United States Supreme Court.

DEPONENT is further informed and believes that the defendant has arranged also with Spartanburg counsel to take part in said petition for review.

Sworn to before me this 31st day of May, 1943.
748 (SEAL) GENEVIEVE REDDICK
Notary Public for South Carolina.

JOHN F. WILLIAMS.

The Court will defer action on the within motion until such time as the Supreme Court of The United States, either assumes jurisdiction of this case, or refuses to take jurisdiction thereof. 749

D. Gordon Baker,
E. L. Fishburne,
T. H. Stukes,
Associate Justices,
E. H. Henderson,
Acting Associate Justice.

June 17, 1943.

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